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No. 07-615
IN THE
SUPREME COURT OF THE UNITED STATES

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner

v.

DARIUSH ELAHI

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

REPLY ARGUMENT

Respondent ostensibly acknowledges, Resp. Br. 16,48-49, that the only real issue before this Court at this juncture is whether he relinquished any right to attach the Cubic judgment under the terms of the Terrorism Risk Insurance Act (TRIA) section 201(c) (amending the Victims of Trafficking and Violence Protection Act (VTVPA) § 2002(d)(5)(B)); Pet. Br. App. 11a. Respondent appears no longer prepared to defend the court of appeals' ruling, Pet. App. 6-12a, that the Cubic judgment was a "blocked asset" under the law prevailing at the time of the decision below. See Resp. Br. 49; *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 240 n.3 (2004); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 9-10 (1991).

This Court should hold that the Cubic judgment is "at issue in claims against the United States before an international tribunal," TRIA § 201(c); Pet. Br. App. 11a, and, therefore, respondent relinquished any rights of attachment against such property when he received $2.3 million in public funds in partial satisfaction of his judgment under TRIA. Resp. Br. 9. There is no need for this Court, at this time, to rule on the status of the Cubic judgment as a "blocked asset" under TRIA, especially in light of respondent's litigation position here and the factual questions that would be attendant with such an inquiry.

I. ELAHI HAS RELINQUISHED ALL RIGHTS TO ATTACH THE CUBIC JUDGMENT AS "PROPERTY AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE AN INTERNATIONAL TRIBUNAL."

Respondent's submissions boil-down to three assertions. The first is that in proceedings before the Iran-U.S. Claims Tribunal, the Cubic judgment is not a proper set-off or recoupment, such as to qualify it as being "at issue." Second, when in doubt, TRIA's relinquishment caveat should be construed in favor of parties like respondent. And, third, that it would violate due process and fundamental fairness to interpret that provision to extend to aspects of Tribunal proceedings that might be unknown to judgment-creditors.

These averments mangle the TRIA's statutory language, misconstrue the jurisdiction and procedure of the Tribunal (both generally, and with respect to the claims implicated here), and disregard other, relevant congressional enactments regarding the United States' participation before the Tribunal. Most disturbingly of all, the fundamental premise of respondent's position – that the Cubic judgment relates solely to MOD's contract with Cubic, and not the ACMR that was the subject of the contract, and is therefore not "at issue" before the Tribunal where the proceedings relate exclusively to the military system; see Resp. Br. 4, 20, 23-29 – is of dubious validity, and, moreover, was diametrically contradicted by respondent's litigation position below. Whether viewed as to their substance, or from the perspective of judicial estoppel,

respondent's contentions here are without merit.

A. Respondent is Judicially Estopped from Asserting that the Cubic Judgment is Analytically Distinct from the ACMR.

1. a. After this Court's prior ruling remanding the matter back to the court of appeals, 546 U.S. 450 (2006) (per curiam), the Ninth Circuit requested briefing, *inter alia*, on whether the Cubic judgment was a "blocked asset" under TRIA section 201. See Pet. App. 9-10a. As has already been discussed, see Pet. Br. 45-52, the Ninth Circuit had previously ruled that Elahi's attempted attachment of the Cubic judgment did not violate Treasury Regulations, see 31 C.F.R. pts. 535 & 560, concerning the disposition of Iranian assets in the United States. See Pet. App. 75-76a. The prior panel held that, for purposes of the applicability of these regulations, "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76a (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)); see also Pet. App. 55a ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.").

But on remand, respondent was obliged to take a different tack and to persuade the court of appeals that the Cubic judgment was – for purposes of the then-existing law concerning "blocked assets" – essentially indistinguishable from the military asset that was the original subject of the blocking regulations and the ICC arbitration: the air combat maneuvering range

(ACMR). Elahi took this position before the court of appeals:

> MOD has acknowledged that the property at issue in this case, i.e. the Cubic judgment, represents the "liquidation to a monetary amount of a military asset manufactured by Cubic and owned by MOD." Brief of Appellant at 31. Because there is no question that this military asset was in the United States prior to January 19, 1981, this property, now in liquidated form, still is subject to the United States blocking orders and, hence, constitutes "blocked assets" pursuant to the TRIA.

Elahi's Response to MOD's Supplemental Rejoinder, *Ministry of Defense v. Cubic Defense Systems, Inc.*, at 8 (03-55015), 2006 WL 3014410 (9th Cir. filed Aug. 15, 2006).

b. Rising to this overture, the court of appeals made the following ruling:

> Following release of the hostages, the United States unblocked most Iranian assets and lifted the trade embargo. However, military goods such as the ACMR remained blocked.
>
> . . . . Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on

> the contracts. See *MOD v. Cubic*, 29 F. Supp.2d at 1170.
>
> In sum, we find that the Cubic judgment is a "blocked asset" under TRIA because it represents Iran's interest in an asset "seized or frozen by the United States. . . under sections 202 and 203 of the International Emergency Economic Powers Act." TRIA § 201(d)(2)(A). Because TRIA § 201(a) waives attachment immunity for such blocked assets, we hold that Elahi may attach the Cubic judgment.

Pet. App. 19-20a (citations omitted).

c. As already noted, respondent has abandoned before this Court any reliance on the Ninth Circuit's rationale for declaring the Cubic judgment as a "blocked asset" under TRIA. Resp. Br. 49. As a collateral benefit of this concession, respondent now asserts a position contrary to the factual predicate of its submission below: that the Cubic judgment and ACMR are analytically indistinguishable. Here, respondent forcefully argues the antipodal contention. See Resp. Br. 23 ("the Cubic 'property at issue' in Iran's claim is the ACMR. Iran's Statement of Claim long pre-dates and does not include the 1998 Cubic judgment."), 24-25 ("Nor can the 1998 Cubic judgment somehow be treated as the same 'property' as the ACMR, which is 'property at issue' before the Tribunal."), 26-29. Because respondent no longer is relying on the Ninth Circuit's legal rationale for the Cubic judgment's characterization as a "blocked asset" under TRIA, he

deems himself at liberty to re-cast his argument as to the nature of the proceedings before the Tribunal and U.S. courts.

2. As this Court has explained in other contexts, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000); see also *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ."). This equitable doctrine has deep roots in federal court practice, and is intended to preserve the integrity of the judicial process and to prevent parties from "playing 'fast and loose with the courts'." See *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (collecting cases).

"Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test," *Zedner v. United States*, 547 U.S. 489, 504 (2006), this Court has observed that

> several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position. . . . A third consideration is whether the party

> seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

New Hampshire, 532 U.S. at 750-51 (citations and internal quotation marks omitted).

As just rehearsed, in order to prevail below, respondent has taken a diametrically opposite position to that advanced here concerning the character of the Cubic judgment. Before the Ninth Circuit, Elahi argued that the Cubic judgment was in essence and unity with the ACMR. Respondent "succeeded in persuading" the Ninth Circuit "to accept that party's earlier position." Id.; see Pet. App. 19-20a.[1] Here,

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[1] Lest respondent suggest that petitioner's position has not been consistent in regard to the legal character of the ACMR, MOD's earlier statement was in reference to a different question altogether: its status as a "military asset" under the Foreign Sovereign Immunities Act (FSIA). See 28 U.S.C. § 1611(b)(2); see also Pet. Br. 51 n.13. More significantly, petitioner's position did *not* prevail below. See *New Hampshire*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,'

respondent has urged that "the 1998 Cubic judgment [cannot] somehow be treated as the same 'property' as the ACMR, which is 'property at issue' before the Tribunal." Resp. Br. 24-25. Whether one speaks in the argot of "prejudice," *Davis*, 156 U.S. at 689, or of "deriv[ing] an unfair advantage" or "impos[ing] an unfair detriment," *New Hampshire*, 532 U.S. at 751, on the petitioner here, the result is the same: Elahi should be precluded from asserting that the Cubic judgment is of such a nature and character as to not make it "at issue" before the Tribunal.

B. The Cubic Judgment is "At Issue" Before the Tribunal as a Set-Off or Recoupment.

Even if this Court were disposed to entertain respondent's assertions on the course of proceedings before the Iran-U.S. Claims Tribunal concerning the Cubic judgment, they are without merit. Elahi has profoundly misapprehended the Tribunal's jurisdiction and procedure, as well as the current disposition of Claims B61 and B66.

1. Respondent seems to willfully miss the point of Iran's requested relief before the Tribunal in *Case B61*. As has already been briefed, Pet. Br. 5-6, Iran is seeking the return of its property or assets situated in the United States, and held in violation of the United States' obligations under paragraphs A and 9 of the

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United States v. C.I.T. Constr. Inc., 944 F.2d 253, 259 (C.A.5 1991), and thus poses little threat to judicial integrity.") (other citations omitted).

General Declaration of the Algiers Accords. See Pet. Br. App. 15a, 18a. Iran's first claim for relief is monetary compensation, particularly where specific performance is impossible (as in the case of the Cubic ACMR, since the equipment was modified and sold to Canada). See *Case B61*, Iran's Statement of Claim (dckt.1) (Jan. 19, 1982), L4-6, L25-26; Claimant's Consolidated Submission, vol. I (dckt.200) (March 8, 1994), L110-14.

The United States has publicly acknowledged that Iran's claim involves an element of monetary compensation for relief. President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Nov. 27, 2008) ("Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive."). If the Tribunal agrees with Iran's submission that the United States has breached its Algiers Accords obligations in relation to the export of the Cubic ACMR, and orders compensatory relief, such damages would have to be off-set by any funds that Iran would have received encompassing the value of the Cubic ACMR. The repatriation of the Cubic judgment to Iran would reflect just such a set-off or recoupment.[2]

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[2] Inasmuch as respondent relates to this Court, see Resp. Br. 25-29, the United States' submissions before the Tribunal denying liability in *Case B61*, he cannot be purporting to prejudge the merits of any Tribunal award in this case. Elahi cannot be substituting his analysis of the

2. Respondent's assertion, Resp. Br. 33, that the United States and Iran have not treated the Cubic judgment as a set-off against (or recoupment to) any recovery Iran might procure against the United States in *Case B61*, is belied by the course of proceedings before the Tribunal. As previously briefed, Pet. Br. 10-11, 32-33; U.S. Br. 16-18, Iran and the United States have mutually confirmed that if the Cubic judgment is repatriated to Iran, "th[at] amount . . . will be recuperated from the remedy sought" by Iran against the United States. J.A.76 n.2; see also U.S. Rebuttal to Claimant's Reply, Statement No. 16 (Cubic) (dckt.410) (Sept. 1, 2003), L645-46; Pet. Br. App. 31a & n.32 (if Iran "receive[s] the amounts due from Cubic under the ICC Award it will 'be recouped from the remedy sought against the United States in Case B61'. . . . Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.").

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strengths of the United States' case before the Tribunal for what will be the Tribunal's award, issued in due course. Were it otherwise, it would render a statutory nullity Congress's careful construction of TRIA's relinquishment caveat to cover both "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal." TRIA § 201(c); Pet. Br. App. 11a (emphasis added). Respondent is certainly not suggesting that proceedings here should be stayed until such time as the Tribunal issues its award in *Case B61*, nor would such be consistent with the plain meaning of TRIA's relinquishment proviso.

Indeed, the status of the Cubic judgment and respondent's attachment have been the subject of correspondence between the Agents of the United States and Iran before the Tribunal.[3] In a January 14, 1999, communique, Iran's Agent addressed his United States counterpart, narrated that Iran had sought enforcement of the ICC Award as to Cubic in U.S. district court, and noted that "[t]he Awarded Amount, if received, is naturally to be recouped from the remedy sought against the United States in Case B61." L1025. Iran's Agent went on to note that "[i]n view of the fact that the Awarded Amount constitutes an integral part of the remedy sought in Case B61 pursued within the framework of the Algiers Declarations," and that respondent's attachment of the Cubic judgment was "incompatibl[e] . . . with the United States' obligations under the Algiers Declarations." L1026. After noting that the United States has made similar interventions before U.S. courts with respect to the enforcement of other Tribunal awards, see id. (citing *Case A27*, Award No. 586-A27-FT (June 5, 1998)),[4] the Iranian Agent

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[3] As previously noted, Pet. Br. 10 n.3, under the Claims Settlement Declaration, article VI(2), Pet. Br. App. 23a, the Agents "represent[]" their respective governments "to the Tribunal and. . . receive notices or other communications directed to it or its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal."

[4] The Tribunal has ruled that "the Algiers Declarations impose upon the United States a duty to implement the Algiers Declarations in good faith so as to

reiterated that "[t]his Awarded Amount[,] unless received by Iran, cannot be offset against any relief which the United States may be found to owe Iran with regard to CUBIC in Case B61." L1026.

Iran's position regarding the United States' right of set-off and recoupment was acknowledged in oral proceedings before the Tribunal. See Case B61 (IAF Cases), Transcript of Hearing, Dec. 1, 2006, L1145-46 ("Iran has made it clear in its written pleadings that this amount of $2.8million if in fact received by Iran should be deducted from whatever amount is awarded by the Tribunal for this claim. But to date, however, the Tribunal should be aware that Iran has received nothing from the Cubic award."). The Tribunal has been fully apprised of the status of the Cubic judgment before U.S. courts. See L1146-47 ("the tortuous history of these proceedings [in U.S. courts] are symptomatic of the extraordinary difficulties Iran faces even in relation to a final award concerning immune property."), L1214 (Transcript of Hearing, Dec. 7, 2006).

3. Both Iran and the United States have acknowledged before the Tribunal that the Cubic judgment, "if received" by Iran, J.A.76 n.2, would have to be set-off or recouped against any amounts that the United States would be obliged to Iran for breaches of the Algiers Accords:

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ensure that the jurisdiction and authority of the Tribunal are respected." *Islamic Republic of Iran v. United States*, Decision No. DEC 62-A21-FT, ¶14 (May 4, 1987), 14 Iran-U.S. C.T.R. 324, 328 (1987).

> The Tribunal's case law requires a claimant to adjust a compensation request to take these factors into consideration. . . . Indeed, the Tribunal has specifically recognized the applicability of settlement agreements and collateral decisions, even absent privity of contract with the United States and even as to different causes of action. *See Futura Trading Incorporated v. National Iranian Oil Company*, AWD 263-324-3 at ¶ 62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986); *Itel Corporation v. Iran*, AWD 530-490-1 at ¶ 36 (June 8, 1992), 28 Iran-U.S. C.T.R. 159, 174 (1992).

U.S. Rebuttal to Claimant's Reply, Statement No. 16 (Cubic) (dckt.410) (Sept. 1, 2003), L645-46; Pet. Br. App. 31a. This submission was consistent with the United States' general position before the Tribunal (to which Iran objected) that Iran was obliged to deduct certain amounts from the fair market value of the property at issue in *Case B61*, including losses it could have avoided by reasonable mitigation. U.S. Rebuttal to Claimant's Reply Brief and Evidence: Issues Common to Multiple Claims (dckt.394) (Sept. 1, 2003), L520-26; see also U.S. Response to Claimant's 2005 Reply Brief and Evidence, Vol. V, Statement No. 16 (Cubic) (dckt.572) (March 1, 2006), L1116-17 ("Included in the ICC award that Iran won from Cubic was an estimation of the value of properties. . . . Having already obtained compensation to these properties

through another proceeding, Iran should not be given a chance to gain even more money for these same items from the United States.").

4. Respondent's protestations to the contrary notwithstanding,[5] Iran's and the United States' position before the Tribunal as to the status of the Cubic judgment as a set-off or recoupment are completely consistent with that arbitral institution's jurisdiction, rules of procedure and jurisprudence.

For starters, the United States has made a timely notice of its intent to employ the Cubic judgment – "if [Iran] received the amounts due from Cubic under the ICC Award;" L645-46; Pet. Br. App. 31a & n.32 – as a recoupment from any amounts owing from the United States to Iran in *Case B61*. Such notice satisfies the Tribunal's Rules of Procedure. See Iran-U.S. Cl. Trib. R. 19(3); Resp. Br. App. 7. Respondent conveniently elides from his discussion that claims and defenses can be amended under Tribunal Rule 20, and that, in any event, the parties may waive any objections to a late-filed counterclaim or set-off. See Iran-U.S. Claim Trib. R. 20 ("During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it

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[5] Respondent is in no position to question the validity of his government's litigation position before an international claims tribunal or to call it into question here. See *Z. & F. Assets Realization Corporation v. Hull*, 311 U.S. 470, 487 (1941); *La Abra Silver Min. Co. v. United States*, 175 U.S. 423, 462-63 (1899); *Frelinghuysen v. Key*, 110 U.S. 63, 71-73 (1884).

inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal."), 30 ("A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.").

Most significantly of all, the Tribunal's jurisdiction extends to "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim," CSD art. II(1); Pet. Br. App. 20a, and the Tribunal's decisions indicate that where a respondent is merely seeking set-off or recoupment, as distinct from a counterclaim (asserting an affirmative recovery), the CSD's requirement that a counterclaim be outstanding as of the Algiers Accords, id., must be relaxed. See *Owens-Corning Fiberglass Corp. v. Islamic Republic of Iran*, Interlocutory Award No. ITL 18-113-2 (May 14, 1983), 2 Iran-U.S. C.T.R. 322, 324 (1983) ("the royalties [the Claimant] was entitled to receive were net of taxes; therefore the question of the amount of any taxes which might be owing on unpaid royalties would necessarily arise as an offset against any recovery of those royalties, even if no affirmative recovery of such amounts could be allowed as a counterclaim."); see also *Sedco, Inc. v. National Iranian Oil Co.*, Award No. 309-129-3, at ¶¶204, 236 (July 7, 1987), 15 Iran-U.S. Cl. Trib. Rep. 23, 84, 94-95 (1987).

This position has been affirmed in later Tribunal decisions, including those upon which respondent relies. See *Computer Sciences Corp. v. Islamic Republic of Iran*, Award 221-65-1, at 51-53 (Apr. 16, 1986), 10 Iran-U.S. C.T.R. 269, 309-10 (1986).

Respondent also utterly ignores the point that the Tribunal itself has already found, in *Case B66*, that "the claim in Case No. B61 raise[s] issues concerning the interpretation or performance of Contract No. 134 [the Cubic contracts] pursuant to the General Declaration." *Case B66*, Pet. Br. App. 26-27a (¶4); see also id. 28a (¶10) (the ruling in *B66* is "without prejudice to any findings [the Tribunal] may make concerning Contract No. 134 in Case No. B61."); *Case B66*, U.S. Rejoinder (Jan. 9, 1984), L1462-63.

That finding, combined with the Tribunal's jurisprudence that allows for set-offs or recoupments of amounts derived from collateral proceedings, even absent privity of contract or with respect to different causes of action (which would normally disqualify counterclaims under the Tribunal's jurisdictional principles), makes the Cubic judgment "at issue" in Tribunal *Case B61.* Respondent's cramped reading, Resp. Br. 44, of the Tribunal's award in *Futura Trading Inc. v. Islamic Republic of Iran*, AWD 263-324-3 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99 (1986), is refuted by the Tribunal's clear holding:

> [Futura's] suit against [third-party] Bank of America [BoA] was not primarily based on the contract with NIOC [National Iranian Oil Corporation] or on the Letter of Credit. Rather it was a negligence

> action based on breach of [BoA]'s duties toward Futura. *This negligence suit arose, however, out of circumstances which are both factually and legally related to the present Case.* The cause of action against [BoA] was, to a great extent, if not exclusively, dependent on the fact that, at the time of the Judgment, Futura had been unable to recover payment from NIOC through the Letter of Credit or otherwise. *In other words, had Futura been successful before this Tribunal prior to adjudication of the suit against [BoA], the damage Futura suffered would, in any event, have been reduced by the satisfaction Futura would thereby have received as a result of its contract claim here.* Under the present circumstances, however, the Tribunal finds that although the satisfaction Futura obtained by the Judgment does not extinguish NIOC's obligations, it means, in practice, that Futura has suffered no damage. . . . [T]he Tribunal agrees[] that allowing Futura to recover both under the present claim as well as the Judgment rendered would be inequitable.

Id. ¶62, 13 Iran-U.S. C.T.R. at 116 (emphasis added). Under the same principles, any award that Iran would receive in *Case B61* for the United States' breach of its Algiers Accords obligations with respect to the ACMR would have to be offset against Iran's recovery of the

Cubic judgment as reflecting "the satisfaction [Iran] received as a result of its contract claim" in a "suit [the] circumstances [of] which are both factually and legally related" to Iran's claim before the Tribunal.

However viewed, the Cubic judgment is "at issue" in Tribunal *Case B61*.

C. TRIA's Proper Construction Supports Petitioner's Position Here.

Respondent attempts, Resp. Br. 29-32, to cloud a straightforward reading of TRIA's relinquishment caveat by resort to various hermeneutic methods. None of these should be availing.

1. The disjunctive structure of TRIA section 201(c)'s relinquishment proviso, Pet. Br. App. 11a, has already been remarked upon. See, *supra*, at 11 n.3. That Congress would seek to protect from attachment or execution both "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal," id., is surely significant. Respondent's suggestion, Resp. Br. 38-40 & 41 n.11, that "property . . . at issue in [a] claim[]"[6] must inevitably be related to

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[6] Respondent's assertion that Congress's use of the word "claim," precludes property that would be subject to a counterclaim, set-off or recoupment before the Tribunal, verges on the frivolous. The Claims Settlement Declaration refers generically to "claims" and "counterclaims" as being within the Tribunal's jurisdiction, see CSD, arts. I, II; Pet. Br. App. 19a-21a, and does not analytically distinguish their treatment.

"the subject of" the Tribunal's final award, as reflected in the *dispositif* of the sentence, is fanciful. It should be enough that Iran and the United States have stipulated before the Tribunal that the Cubic judgment, if received by Iran, will be deducted from any amounts owing by the United States to Iran in *Case B61.* In TRIA's relinquishment proviso, Congress imposed no technical requirement on the form and substance of Tribunal awards, or restrictions on the course of proceedings before that arbitral institution – nor could it.

Where Congress has legislated the legal consequences of U.S. participation before international claims institutions, this Court has consistently assumed that Congress defers to the State Department, not only with respect to the actual conduct of those arbitrations, but also to the characterization of those proceedings and awards under U.S. law. See *Z. & F. Assets*, 311 U.S. at 487 ("proceedings before such a commission might easily give rise to questions between the governments concerned and might involve diplomatic representations or protests with which it would be the duty of the Secretary of State to deal. Whatever might be said of such representations or protests, or the occasion for them, or with respect to the existence of any international right or obligation arising from the agreement setting up the Commission, Congress could, and naturally would. . .look to the Secretary of State for the exercise of his appropriate authority on behalf of the Executive and thus for his judgment upon the question whether the proceedings had been such as duly to qualify the awards for

payment.") (citing *Frelinghuysen*, 110 U.S. at 75; *United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 323, 325 (1891)). Likewise, in construing TRIA's relinquishment caveat, it should be assumed that Congress intended a broad meaning for "property . . . at issue in claims against the United States."

2. Respondent places great weight on TRIA section 201(c)(4)'s statutory construction provision, which states, in its entirety, "Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law." Pet. Br. App. 11a. As previously observed, Pet. Br. 28 n.7, this can offer no succor to respondent.

This is not a general-purpose, "when-in-doubt-construe-in-favor-of-terrorist-victims" *meta*-command by Congress, as respondent maintains. It applies only to "judgment[s] to which this subsection applies," and so obviously begs the question of whether the party holding the judgment in question has waived his right to attach under TRIA section 201(c)(4)'s relinquishment caveat. Moreover, the statutory construction provision is qualified in another way; it applies only "against assets otherwise available under this section." This is a clear reference to the relinquishment caveat that follows this clause. See Pet. Br. App. 11a. TRIA's "statutory construction" provision says nothing about the scope of relinquishments, which sorts of property are "at issue" before an international tribunal, or any

other matter relevant to this case.[7]

3. Respondent's parsing of TRIA's legislative history is equally unenlightening. It is true that Congress evinced an interest to "deal comprehensively with the problem of enforcement of judgments," but this was specifically in relation to those procured under FSIA section 1610(f), now codified at 28 U.S.C. § 1605A. See TRIA Legisl. Hist., at 27, 2002 U.S.C.C.A.N. at 1434. Even more pertinently, the TRIA conference report indicated that the legislation sought, "once and for all, that such judgments are to be enforced against any assets in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, *except as expressly provided in this act*." 148 Cong. Rec. at S11528 (emphasis added). TRIA section 201(c)'s relinquishment caveat was, obviously, an "express[]" provision concerning, and qualification of, judgment-creditors' rights to proceed "against any assets in the U.S." Nothing in TRIA's legislative history bears on the proper construction of the relinquishment caveat.

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[7] Petitioner is by no means suggesting that this "statutory construction" clause is devoid of meaning. To the extent that recourse to TRIA's sparse legislative history is even appropriate here, it may be that Congress desired to make clear that the class of eligible parties, "left out of" the VTVPA, were grandfathered into TRIA's provisions. See *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434 ("The Conferees have sought to correct this injustice.") [TRIA Legisl. Hist.].

D. Neither Equity or Due Process is Offended by Enforcing Congress's Relinquishment Caveat.

None of respondent's submissions controvert that TRIA's "at issue" language should be granted a broad construction. See Pet. Br. 25-31; U.S. Br. 13-21. But it is hardly necessary for this Court to afford any extended ambit to the "at issue" formulation, in order to cover the circumstances presented here. It is enough that the United States stands to benefit in proceedings before the Tribunal if the Cubic judgment is released from Elahi's lien and is remitted to MOD. However the Cubic judgment is characterized, Iran will be obliged before the Tribunal to deduct it from any award due from the United States in *Case B61* – but only if it is actually received by MOD.

In the face of this straightforward submission, respondent is reduced to suggesting, Resp. Br. 45-48, that any such application of TRIA's relinquishment caveat on these facts would render the provision inequitable, or even unconstitutional. Respondent particularly complains about the secrecy of proceedings before the Claims Tribunal, and that he could not possibly have made a constitutionally-knowing relinquishment of his right to attach the Cubic judgment. Resp. Br. 11, 46-47. This technique of statutory construction, via parade-of-horribles, is discredited – and for good reason. See *Small v. United States*, 544 U.S. 385, 399-402 (2005) (Thomas, J., dissenting, joined by Scalia & Kennedy, JJ.); *N.L.R.B. v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583-84 (1994); *Dickman v. C.I.R.*, 465 U.S. 330,

341-42 (1984). In any event, respondent's submission makes no sense here; Congress has prescribed the public availability of Iran-U.S. Claims Tribunal proceedings and respondent (or anyone, for that matter) was on sufficient notice that the Cubic judgment was "at issue" in *Case B61*.

1. In Title V of the Foreign Relations Act for FY 1986 and 1987, Congress legislated the "confidentiality of records" for proceedings before the Iran Claims Tribunal. Pub. L. No. 99-93, Title V (Iran Claims Settlement), § 505, 99 Stat. 437 (1985). Congress indicated that, the provisions of the Freedom of Information Act, 5 U.S.C. § 552, notwithstanding,

> records pertaining to the arbitration of claims before the Iran-United States Claims Tribunal may not be disclosed to the general public, except that –
>
> (1) rules, awards, and other decisions of the Tribunal and claims and responsive pleadings filed at the Tribunal by the United States on its own behalf shall be made available to the public, unless the Secretary of State determines that public disclosure would be prejudicial to the interests of the United States or United States claimants in proceedings before the Tribunal, or that public disclosure would be contrary to the rules of the Tribunal; and
>
> (2) the Secretary of State may determine on a case-by-case basis to make such

> information available when in the judgment of the Secretary the interests of justice so require.

Id. This legislation was partially justified, in the Executive branch's proposal, out of a concern for protecting litigation materials exchanged at the Tribunal under strictures of confidentiality. *The Iran Claims Act*, H.R. Subcomm. on Intl. Econ. Pol'y & Trade of the Comm. on Foreign Affairs, Hearing on H.R. 3241, 98th Cong., 1st Sess. 1, 8 (June 16, 1983) (prepared statement of Michael J. Matheson, Deputy Legal Advisor, Dep't of State) ("certain documents received on a basis of confidentiality from the Tribunal, unless classified, may [without this legislation] be required to be disclosed to the public.").; id., S. Comm. on Foreign Relations, Hearing on S. 771 & 1166, 99th Cong., 1st Sess. 77 (May 20, 1985) (testimony of Michael J. Matheson) ("pleadings to the Tribunal, which under the Tribunal rules are to be held in confidence.").

So, if respondent has concerns about the public availability of Tribunal litigation documents, particularly those filed by Iran, that is a matter for Congress, and it can hardly be gainsaid that it is within Congress's plenary authority, pursuant to the United States' obligations under a treaty instituting an international claims settlement, CSD, art. III(2), Pet. Br. App. 21a; Iran-U.S. Cl. Trib. R. 32(5), to stipulate the access of private parties to the proceedings of such institutions. See *Z. & F. Assets*, 311 U.S. at 487; *Frelinghuysen*, 110 U.S. at 75.

2. In any event, the public was certainly on notice as to the connection between Cubic and *Case*

B61, by virtue of the Tribunal's 1987 award in *Case B66*. Pet. Br. App. 25a. That decision, which was publicly-released, clearly references Cubic's contracts 134 and 134a with the Iranian Air Force, entered into on October 23, 1977. See id. These same contracts were cited in petitioner's original petition for an order confirming a foreign arbitral award. J.A.22-23 (¶IV). Indeed, the district court, in issuing such an order, referred to these contracts. J.A.56. This was certainly sufficient to put any judgment-creditor in Elahi's position, about to execute a TRIA relinquishment, that the Cubic judgment might not be within the universe of available assets to attach because it was "at issue" before the Iran Claims Tribunal.

To the extent that respondent is heard to complain about the general secrecy of arbitral proceedings (whether before the Iran Tribunal or the International Chamber of Commerce (ICC)), such is inconsistent with this Court's endorsement of arbitration institutions, despite the paradigmatic confidentiality of the proceedings as between private disputants. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008).

3. Respondent's novel arguments concerning due process, see Resp. Br. 45-48, are wholly unwarranted. The standard articulated by petitioner and the United States simply does not "raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), or interpret the statutory language to

"invoke[] the outer limits of Congress' power," *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), such that this Court should read "at issue" so narrowly as to reach the vanishing-point. Despite respondent's assertion of due process "difficulties," Resp. Br. 48, the interpretation of the relinquishment provision, advanced by petitioner and the United States, provides adequate notice of the property interests at stake.

If the government may, pursuant to the United States' international obligations and the President's recognition powers, nullify attachments and liens on Iranian assets in the United States, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981), then surely it does not violate due process when parties such as respondent accept, without coercion and upon the advice of counsel, a statutory invitation to relinquish property interests in order to receive immediate compensation. Respondent's assertion that Congress "require[s] citizens to waive 'rights' in property," Resp. Br. 48, mischaracterizes the nature of the partial payment scheme. The relinquishment provision was only triggered "at the [respondent's] election" to opt into the partial payment scheme. VTVPA § 2002(a)(1), Pet. Br. App. 1a; see also TRIA § 201(c)(4), Pet. Br. App. 11a (an eligible person's "election" to receive partial payment puts the terms of VTVPA § 2002(a)(2)(D) into effect). When respondent accepted $2.3 million as partial payment of his claim by the U.S. Treasury, he received a valuable property interest *in exchange for* his decision to forgo another property interest. This hardly resembles a deprivation without

notice, or a potentially erroneous deprivation.[8]

II. THIS COURT SHOULD NOT CONSIDER, IN THE FIRST INSTANCE, WHETHER THE CUBIC JUDGMENT IS A "BLOCKED ASSET" UNDER THE OCTOBER 2007 DESIGNATION.

As previously noted, *supra*, at 1, respondent appears no longer prepared to defend the Ninth Circuit's holding and rationale that the Cubic judgment was a "blocked asset," within the meaning of TRIA at the time of the decision below. Resp. Br. 49. Respondent is obviously free to make these choices as to litigation strategy, but they must come with consequences. One of these is with respect of judicial estoppel as to the factual predicates of positions

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[8] Respondent's claim that the United States must guarantee a "full awareness" of the right and the consequences of its relinquishment, Resp. Br. 48, depends on a case concerning the fundamental right to counsel, not the exchange of property interests in a civil context. See *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (rights conveyed in the *Miranda* warnings may be waived only if done "voluntarily, knowingly and intelligently") (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). To import that criminal procedure standard into the context of property interests would be unprecedented. See *New York v. Hill*, 528 U.S. 110, 114 (2000) (distinguishing procedures required for waiver of fundamental rights from those required for waiver of other rights). Even were the Court to do so, the process provided here was more than adequate, particularly given the weighty governmental interests supporting the United States' position. See Pet. Br. 41-44.

proffered – and accepted – below. See *supra*, at 3-8. The other has to do with the permissible reach of this Court in deciding factual and legal grounds which have never been raised or considered previously.

While it is true that a prevailing party on appeal may assert any ground in support of a ruling, whether or not relied upon or considered by a trial court, that principle comes with two major qualifications. The first, recognized in the cases upon which respondent depends for this principle of appellate procedure, see Resp. Br. 51 n.13, is that if an appellee or respondent shifts terrain in order to snatch victory out of the jaws of defeat, the facts necessary for such a strategic withdrawal had better be in the record. See *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924) ("appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record.")). The second condition, mentioned in *Dandridge*, is the obvious concern for judicial economy: "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." Id. (citing *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947); *United States v. Ballard*, 322 U.S. 78, 88 (1944)).

In relation to the Secretary of State's October 2007 designation of the Ministry of Defense and Armed Forces Logistics (MODAFL), 72 Fed. Reg. 71,991 (Oct. 25, 2007), there are two, connected sets of factual

issues that would need to be determined by a trial court. The first is whether such designation actually extends to the petitioner in this case, the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MODSAF-IRI"), as identified in the petition for an order confirming a foreign arbitral award. J.A.21. Designations made by the Secretary of State are routinely litigated in U.S. courts as to whether they apply to particular entities, and such are treated as questions of fact. See *Chai v. Dep't of State*, 466 F.3d 125, 130-32 (D.C. Cir. 2006); *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004).

The second issue is whether MODSAF-IRI, even if covered by the designation, is the ultimate beneficiary of the Cubic judgment such as to render it a "blocked asset" under Executive Order 13382, 3 C.F.R. 170 (2006). Petitioner is obviously not "disput[ing] that it is a proper party to its own judgment," U.S. Br. 31, only that the Iranian Air Force would be the ultimate beneficiary of the Cubic judgment, under the relevant Iranian law. See Act of 28 Mordad 1368, art. 4 (Iran Aug. 19, 1989) (organic statute for MODSAF-IRI). That MODSAF-IRI was acting for the Iranian Air Force in seeking confirmation of the Cubic award, and procuring the Cubic judgment, has been manifest in proceedings before the Iran Claims Tribunal, see L24, L1133, and U.S. courts. See J.A.23 (¶VI).

In light of the divergent positions taken by respondent in this litigation, this Court should not reach the question of whether the Cubic judgment is a

blocked asset under TRIA. In the event that this Court rules that respondent has not otherwise relinquished his right to attach, the proper judicial course would be to vacate the court of appeals' judgment on this point, and remand for further proceedings.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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